No. [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

CHARLOTTE SLAVITT,

Petitioner

v.

GLENN F. MEADER, ROBERT J. NEGRI, RAYMOND G. BUSBY, AND OTHER PERSONS AT THIS TIME TO YOUR PLAINTIFF UNKNOWN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLOTTE SLAVITT, Petitioner, Pro Se, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals For The District Of Columbia Circuit, entered on April 14, 1960, affirming the District Court's order denying a motion under Federal Rule of Civil Procedure 60(b) to vacate the Clerk's *nunc pro tunc* default dismissal order and to reinstate the action.

OPINION BELOW

The opinion of the Court of Appeals (Appendix B, *infra*, pp. 37-39) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1960 (Appendix B, *infra*, p. 40). A timely petition for rehearing *en banc* was denied May 9, 1960. (Appendix B, *infra*, p. 41). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Is a District Court order denying a motion under Federal Civil Rule 60(b) to vacate the Clerk's *nunc pro tunc* default dismissal order and to reinstate the action, *per se*, a final decision under 28 U.S.C. 1291?

2. For "failure to prosecute", does a District Court have the power to provide by Local Rule that a cause of action *shall stand dismissed*, with Clerk entry *of that fact*, and *without* prior notice and hearing, upon the litigant's failure "from the time action may be taken, to comply with any law, rule or order requisite to the prosecution of his claim . . . if the delinquency continues for six months", and

Does such Rule contravene due process and jury trial rights by failing to require prior notice and hearing, by the default grounds being vague and uncertain, and by delegating judicial power to the Clerk?

3. Does a District Court have the power to enforce by "practice" under the above provisions the requirement of obtaining alias summons within six months of the marshal's last not found return when no such federal or local "law, rule or order" exists, and

Was plaintiff's action properly dismissed for such default ground, "pursuant to" such Rule, by the Clerk's *nunc pro tunc* order, without prior notice and hearing, dismissing her action as of six months before?

4. Are the Clerk's nunc pro tunc order, the applied provisions of the Rule and alias summons "practice" thereunder, invalid as being inconsistent with Federal Civil Rules 4(a) and (g), 38(a), (b), and (d); 41(b); 58; 77(c); 79(a); 81(e); 82; and 83?

5. May a Court of Appeals deny jurisdiction on constitutional and Federal Civil Rule inconsistency issues raised by appellant claiming relief under Federal Civil Rule 60(b)(1), (4), and (6)?

6. Is diligence and discretion in issue in the matter of a void dismissal; and if in issue in this case, was there an abuse of discretion by the District Court in its hearing, findings, and order denying plaintiff's motion to vacate and reinstate, when the unserved defendant was continuously outside this jurisdiction, and later was also incompetent for reason of insanity, and plaintiff had adhered to the required alias summons' practice in the past?

STATUTES, RULES, AND TEXTS

The pertinent statutes, rules and texts are printed in Appendix A, *infra*, pp. 31-36.

STATEMENT

This petition is directed against the denial of jurisdiction by the Court of Appeals on appellant's claims that she had been deprived of her property and jury trial rights without due process of law by the Clerk's *nunc pro tunc* dismissal order, on his own motion, without prior notice and hearing, entered upon a default ground, and "pursuant to" Local Rule 13 and alias summons practice thereunder, claimed void. Appellant claimed the Clerk's order, rule and practice void for inherent failures of due process, and for inconsistency with a number of pertinent Federal Rules of Civil Procedure. On the appeal the Government, representing appellees, did not deny or con-

test appellant's claims of the want of jurisdiction for the constitutional and Federal Rule "consistency" failures charged, except for a statement alleging consistency with Federal Rule 41(b), *infra* p. 10.

Because the Opinion below bears so little relationship to the basic issues and material facts before the Court, this Petition must include more detail than is usually found necessary. The claimed due process failures are not specified in the Opinion. Omitted is any mention of the recorded role of Rederal Rule 60(b) in these proceedings; of the lack of prior notice and hearing; of the *nunc pro tunc* dismissal feature, the alias summons default ground and practice, the actual circumstances of the prior dismissal, the unserved Meader's continuous absence from this jurisdiction and later insanity, plaintiff's claim in the District Court of "excusable neglect" for failure to obtain the alias summons and of "invalid" *nunc pro tunc* order, and of the District Court's other finding of failure to "make a showing of excusable neglect". (R. & JA 52-57; 64). The Bar Association's entry in this case and reasons therefor, and its opposing Brief *Amicus*, all point to the validity of petitioner's contention that, on the issues raised by the record in the case, a determination on the validity of the Rule and dismissal under the Rule was required.

1. *Cause of Action.* This is a suit in libel and conspiracy, filed in August 1953, for alleged tortious acts petitioner claims to be in violation of sec. 5 of the Civil Service Act of 1883, 5 U.S.C. 637, 22 Stat. 405 (Appendix A, *infra*, p. 32). This criminal statute prohibits false representations, wilfully made, by "any person in the public service" "to any person" for the purpose of preventing anyone examined under the civil service laws from being employed or promoted.

The Complaint (R. & JA 4) alleges that by false, fraudulent and malicious representations, knowingly so

made, to Capt. B. Tieslau, Officer-In-Charge of the U. S. Navy Purchasing Office, Washington, D. C., hereinafter called NPO, the defendants caused, wrote, published in and outside of NPO, and procured the Captain's signature to, the alleged libels, Exhibits A and C of the complaint, with the purpose of forcing plaintiff's resignation or removal from her position as Contract Negotiator, Grade GS-12, upon grounds of unsatisfactory work performance. When plaintiff refused to resign, this method of ouster was abandoned, with removal purpose effected some months later under guise of a reduction in force, effective July 31, 1953. Plaintiff was the sole buyer or negotiator so reduced (JA 11, 37). That these tortious actions were fraudulently employed by defendants as a retaliatory measure against plaintiff for her refusal to "go along" on certain government contract matters for favored contractors in a manner contrary to law and Navy policy (R. & JA 9, 10).

Exhibit A of the Complaint, dated September 15, 1952 (R. & JA 14), purporting to be the 90 day warning required by law, charges plaintiff with "unsatisfactory performance" for, *inter-alia*, being too partisan in protecting the Government's economic interests. By reply of Nov. 3, 1952, (R. & JA 16), plaintiff pointed out that Exhibit A failed to comply with the regulations, requested detailed proof of the general charges made, suggestions for "improvement", and copies of the claimed "adverse reports". By response, Exhibit C of Nov. 17, 1952 (R. & JA 22), NPO refused to furnish such proof, details, copies, and suggestions. These documents, and all matters pertaining thereto, were kept secret from the Personnel Office, the files being retained by the Captain.

Capt. Tieslau, signer of the documents, *is not named* as a party herein.

Original defendants were Lt. Cdr. Meader, Lt. (jg) Negri, John Doe, and Persons Unknown. Under cross-

examination of plaintiff, depositions were taken of defendant Negri on Sept. 8, 1953, and of Capt. Tieslau on Oct. 15, 1953. (R. & JA 25-30; 30-37). These depositions established that Raymond G. Busby, chief civilian and specialist in government personnel and procurement policies, had participated in the alleged tortious acts. Busby was substituted for John Doe by court order, and amended complaint filed (R. & JA 44-46). In August 1952, plaintiff's immediate supervisor, Lt. C. F. Teeple resigned from the Navy; the Captain's Executive Officer was transferred to another station; Meader became second in command to the Captain; Meader assigned Lt. Negri to head up plaintiff's section; and Exhibit A followed a month later. Negri and Busby were promptly served (R. & JA 1, Aug. 13, 1953; 2, Sept. 3, 1954).

Original and repeated alias summons against Meader and Persons Unknown were returned not found. Plaintiff has been unable to obtain personal service on Meader because he was continuously outside this jurisdiction. In 1955 plaintiff filed suit in the Court of Claims. Meader was ordered back from London to duty in Washington, D. C., and could then have been served. But upon receipt of these orders, Meader went violently berserk; became physically paralyzed and mentally disabled; was treated in several naval hospitals without avail; and was subsequently discharged from the Navy as insane. To last information, he was very recently released from neuropsychiatric Veterans' hospital at Palo Alto with partial recovery. (R. & JA 49; 54). Plaintiff's motion for a physical examination order and *guardian ad litem* appointment for Meader was denied (JA 49-51).

2. *Local Rule 13 Dismissal Proceedings*: Among other default grounds "for failure to prosecute", Local Rule 13(a) provides that a claim "shall stand dismissed without prejudice, whereupon the clerk shall make entry of that fact" upon a litigant's failure

> "from the time action may be taken, to comply with any law, rule or order requisite to the prosecution of his claim . . . if the delinquency continues for six months."

After five months, "the clerk shall warn" the dilatory party by mail." Para. 13(b) withdraws the notice requirement, providing that the clerk's failure "to give the warning" will not affect the "operation" of the rule. (App. A, *infra*, p. 34)

Under the above automatic dismissal "operation", this District Court "practice" requires for unserved defendants the continual procural of alias summons within six months of the marshal's last "not found" return, *District of Columbia Practice*, by Paul Flaherty, Vol. 4, 1949 ed. p. 44:

> "An alias summons may be issued at any time after the return 'not found' of a prior summons, but such alias summons should be requested within 6 months of the previous summons, in order to avoid a dismissal for want of prosecution under the Local civil rules of the U. S. District Court D.C. 64"

Fn. 64 cites D. C. Rules 7(a) [requiring unserved summons' return on the twentieth day after issue] and 13(a) and (b).

On March 10, 1959, the district court Clerk denied plaintiff's request for alias summons for defendants #1 and #4, Meader and Persons Unknown, claiming "delinquency" under Rule 13 for her failure to obtain such aliases within six months of the marshal's last "not found" return on March 31, 1958. No "warning" notice had been sent and no dismissal entered. That day, on March 10, 1959, and again without prior notice and hearing, "pursuant to Local Rule 13", the Clerk entered a *nunc pro tunc* order dismissing without prejudice plaintiff's action "as of October 1, 1958" (R. & JA 3; 52).

3. *Motion Proceedings Under Federal Rule 60(b)*: On March 31, 1959, plaintiff moved under 60(b) to vacate

the clerk's *nunc pro tunc* order and to reinstate the action. (R. & JA 52-57). Her petition stated that her inability to obtain service on Meader was not wilful and through no fault of her own since he had always been outside this jurisdiction, and was now insane. She had diligently adhered to the required practice of obtaining alias summons, generally not waiting for the "warning" notice, and her failure to obtain them in the fall of 1958 was not wilful but in mistake, inadvertence and excusable neglect. She thought she'd obtained them, and no notice or dismissal order had been sent or entered at any time prior to her alias request since the marshal's last return. Plaintiff asserted she had acted in good faith, in obedience to the rule. Further, her petition alleged that the Clerk's *nunc pro tunc* order was invalid as being contrary to Federal Rule 58; that no equities had intervened, and failure to reinstate would deny her the right to a trial upon the merits; "and for other reasons".

Further, plaintiff's petition advised the Court of the prior dismissal and reinstatement—all of which had occurred without her knowledge, authority, consent or notification, when there was a co-counsel on record. These events included a notice to co-counsel, dismissal under Rule 13 after failure to obtain alias summons; agreement between co-counsel and the United States Attorney's office to reinstate partially as to Negri, with a dismissal by co-counsel as to Meader et al. Co-counsel so moved, and the order was allowed on April 27, 1954. (R. & JA 37-40). When plaintiff accidentally learned of these events on June 4, 1954, she moved under 60(b) for full reinstatement which was allowed by order July 30, 1954 as to Meader, John Doe and Other Persons (R. & JA 40-43; 56).

Plaintiff's "Points and Authorities", attached to the Petition, cited Rule 13, and F.R.C.P. 60(b), 58, 77(c) and (d), and 79(a), and cases thereunder.

Defendants opposed plaintiff's 60(b) motion upon grounds of no "proper showing of excusable neglect"; "plaintiff was granted two prior motions to reinstate"; defendants' scope of employment; frivolous complaint, and failure to state cause of action. (R. & JA 57-58). Plaintiff's claim of the invalidity of the *nunc pro tunc* order was not refuted.

The District Court's order, April 24, 1959, denied plaintiff's motion "to reinstate this action and to vacate the order of dismissal entered pursuant to Rule 13" with findings of failure to make a showing of excusable neglect and of lack of due diligence. (R. & JA 64). Plaintiff appealed from that order (R. & JA 65).

4. *In The Court Of Appeals*: After appellant's brief was filed, the Government filed on Nov. 4, 1959, a "Motion To Affirm Or Dismiss" (R. pp. 66-71) which appellant answered (R. pp. 72-80). Appellees made no claim that the appealed order lacked finality. On Nov. 25, 1959, the Court ordered appellees' motion held in abeyance with argument thereon in hearing on the merits; and, further, that counsel "discuss at the argument whether the order appealed from is a final order under 28 U.S.C. § 1291" (R. p. 81). By memorandum on hearing date, the sitting Division Judges were advised of the order holding appellees' motion "in abeyance pending hearing on the merits." The further order to counsel to argue the finality of the appealed order was not referenced therein. [Clerk's file]

In the Court below, and upon the specific grounds shown *infra*, appellant's brief argued, *inter-alia*, that the Clerk's *nunc pro tunc* dismissal order, entered without prior notice and hearing, and the applied provisions of Local Rule 13(a) and (b) and alias summons default ground thereunder, are void for inherent failures of due process, for contravening 28 U.S.C. 2071 and 2072, and for being inconsistent with Federal Rules of Civil Pro-

cedure 4(a) and (g); 38(a), (b), and (d); 41(b); 58; 77(c); 79(a); 81(e); 82; and 83. On these jurisdictional issues, appellees had one comment: "Local Civil Rule 13 is reasonably incorporative of and consistent with Rule 41(b) of the Federal Rules." Except for that, the Government did not contest a single one of appellant's specific claims of the constitutional and Federal Rule transgressions.

Complying with the Court's order for argument on the finality of the appealed order, appellees' brief responded: "Appellee suggests doubt as to the finality of the order and its appealability. The authorities appear to show that the order is unappealable." [p. 7] No case under 60(b) was cited.

The Bar Association's brief *amicus* argued validity in Local Rule 13(a) and (b). The alias summons practice and default ground under the Rule is not discussed. Excerpts from this Brief are set forth in Appendix C, *infra*, pp. 42-43.

6. *Decision Of The Court Of Appeals*: (Appendix B, *infra*, p. 37) The District Court's order denying plaintiff's motion under 60(b) is affirmed on two grounds. First, the Court below "construe[s] the appealed action as including a decision made in the exercise of the court's inherent power to dismiss the action for lack of prosecution." And "So construed the order is clearly a final and appealable decision" under 28 U.S.C. 1291. Secondly, "the history of this litigation, as shown by the record and as developed" in the motion hearing, justified the District Court's finding of lack of due diligence. There was, therefore, no abuse of discretion by the District Court "in permitting the dismissal to stand." And by such "disposition", the decision holds it "unnecessary to consider" the jurisdictional questions raised by appellant "as to whether the dismissal was properly made under Local Rule 13, or to reach the question of the validity of that Rule." (App. *infra*, p. 39)

The Opinion recites Local Rule 13(a) and (b) in full with its several disparate default grounds. The one applied is not designated. The District Court's finding of failure to make a showing of excusable neglect goes unmentioned. The employed alias summons default, Federal Rule 60(b), appellant's claims of constitutional and Federal Rule violations, the *nunc pro tunc* order, Meader's absence from the jurisdiction, the lack of prior notice and hearing, and other facts and law pertinent to the issues in this case are absent, with no indication of their existence or connection in this case. Not one single *word* in the Opinion is given to plaintiff's specific grounds for relief or appeal.

Appellant's Petition For Rehearing En Banc was denied by order May 9, 1960 (App. B, *infra* p. 41)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in the interests of justice and the uniform application of the Federal Rules of Civil Procedure, and in the exercise of the supervisory powers of this Court in the administration of justice in the federal courts. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 7; *Societe Internationale, etc.* v. *Rogers*, 357 U.S. 197, 203; *Miner, et al.* v. *Atlass*, —— U.S. ——, 4 L. ed. 2d 1462; *United States* v. *National City Lines*, 334 U.S. 573, 589; *Klapprott* v. *United States*, 335 U.S. 601.

The decision fails to meet the facts and jurisdictional issues in this case and creates one question of paramount importance: Is due process to be required only of the executive and legislative branches, and objective review to be foreclosed by a Court of Appeals when the challenged procedures are engendered by local rule within the judicial department itself?

The United States is forbidden by fundamental law from depriving any person of his substantive rights with-

out due process of law, and its federal judiciary is included in this prohibition. *Hovey* v. *Elliott*, 167 U.S. 409, 417-418; *Societe Internationale*, etc. v. *Rogers*, *supra*; *Bass* v. *Hoagland*, 172 F 2d 205, 209, c.d. 338 U.S. 816. There is no constitutional exemption that says the people of the District of Columbia may lawfully be deprived of any of the life, liberty, property, or jury trial constitutional guarantees. *Callan* v. *Wilson*, 127 U.S. 540, 550; *Bolling* v. *Sharpe*, 347 U.S. 497. Alike with the District Court procedures employed in this case, the decision below "'wants all the attributes of a judicial determination'"; and if allowed to stand uncorrected by this Court becomes a warrant for "'judicial usurpation and oppression and can never be upheld where justice is justly administered.'" *Old Wayne Mutual Life Assoc.* v. *McDonough*; 204 U.S. 8, 17.

In context, the Court's decision sanctions for this jurisdiction the continued departure by the lower court from the most elemental due process procedures. If the alias summons "practice",—the automatic "shall stand dismissed" clause, and the "operation" of Local Rule 13 are lawfully authorized; if the applied provisions of the Rule fulfill constitutional demands; if the Clerk's dismissal "pursuant to Local Rule 13" is valid—the Court below would not say so, holding no "abuse of discretion" by the District Court "in permitting the dismissal to stand". What "stands", therefore, as the judgment in this case is the Clerk's *nunc pro tunc* order of dismissal without prejudice, on his own motion, without prior notice and hearing, the jurisdiction for which the Court below would not examine, for an alleged default ground the Court would neither identify nor review, entered "pursuant to" a Local Rule the Court would not construe.

1. *The Decision Is A Denial Of Due Process.* The decision creates a new and unexpected basis for the claim

of the denial of due process. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 678. Petitioner sustained a direct injury from the District Court proceedings claimed contrary to the Fifth and Seventh Amendments, the injunctions in 28 U.S.C. 2071 and 2072, and the transcendent pertinent Federal Civil Rules. She has a right to the full review and ruling on the questions raised under these mandates. By denying jurisdiction, avoiding even identification, of these issues, the Court below abdicated its judicial function in its own described "powers and responsibility in relation to the administration of justice in the courts of the District", *Wildeblood* v. *United States*," 106 U.S. App. D.C. 338, 340, 273 F 2d 73. Cf. *Barr* v. *Matteo*, et al, 355 U.S. 171; *Harmon* v. *Brucker*, 355 U.S. 579, 581-582; *LaBuy* v. *Howes Leather Co., Inc. et al* 352 U.S. 249, 256; *Drew* v. *Hogan*, 26 App. D.C. 55, 62.

Courts must be ever watchful of the constitutional rights "against any stealthy encroachments thereon", and apply the supreme and reject the inferior law when the two conflict. *Byars* v. *United States*, 273 U.S. 28, 32; *Carter* v. *Carter Coal Co., et al*, 298 U.S. 238, 296. A federal court has no discretionary power to decline jurisdiction on issues affecting substantive rights on questions arising under the Constitution, *Cohens* v. *Virginia*, 6 Wheat. 264, 404; *Ex Parte Young*, 209 U.S. 123, 143; *United States* v. *Fisher*, 2 Cranch 358, 395. Or to disregard statutes, Rules, and procedures it is obligated to adjudicate, enforce and uphold. *United States* v. *National City Lines, supra*, 588; *Rio Grande Irrigation & Colonization Co.* v. *Gildersleeve*, 174 U.S. 603, 608; *LaBuy* v. *Howes Leather Co., supra*. Or so to eschew jurisdiction over matters under its cognizance as to hinder the upper court from exercising its appellate jurisdiction over unauthorized actions of a lower court. *Ex Parte United States*, 287 U.S. 241, 250; *Ex Parte Simons*, 247 U.S. 231, 239; *McClellan* v. *Carland*, 217 U.S. 268, 280.

The decision is in conflict with cases holding that questions of jurisdiction for the judgment rendered in the court below must be considered on their merits whenever raised, at any stage, in any proceeding, and a judgment reached without due process of law is without jurisdiction and void. *Scott* v. *McNeal*, 154 U.S. 34, 46; *Old Wayne Mutual Life Assoc., supra; Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695, 704-705; *United States* v. *Ohio Power Co.*, 353 U.S. 98. It is the duty of the appellate court to give judgment *on the whole of the record*, and where the errors affect the substantial rights of the appellant, the judgment below must be reversed. *Garland* v. *Davis*, 4 How. (U.S. 131, 143; *United States* v. *River Rouge Improvement Co., et al*, 269 U.S. 411, 421; *McCandless et al* v. *United States*, 298 U.S. 342, 347; *Washington Railroad* v. *Bradleys*, 10 Wall. 299.

2. *The Decision Ignores The Application Of Federal Rule 60(b).* The Opinion below completely censors-out the recorded role of Federal Rule 60(b) in this case. Why? No reference or clue is given that appellant claimed relief under 60(b)(1) for "mistake, inadvertence, or excusable neglect", 60(b)(4), "the judgment is void", and 60(b)(6), "any other reason". Yet her petition to vacate uses the language of the Rule, and the attached Points and Authorities in the Record cited 60(b) and cases thereunder (R. & JA 52-57). Plaintiff claimed "excusable neglect" for having failed to obtain the alias summons against Meader in the fall of 1958. Defendants claimed "no proper showing of excusable neglect" (R. & JA 57). Plaintiff's petition claimed the Clerk's *nunc pro tunc* order invalid. Defendants' Opposition did not deny that. The appealed order contains a finding of "failed to make a showing of excusable neglect", and denies plaintiff's motion "upon consideration" thereof, "the opposition thereto, and the hearing held thereon" (R. & JA 64). Appellees' MOTION TO AFFIRM OR DISMISS states appellant's motion below was filed under 60(b) and

denied (R. p. 68). Appellant's brief specifically argued reversal grounds under 60(b)(1), (4), and (6). Appellees' brief recited 60(b) in full, among STATUTES AND RULES INVOLVED.

Federal Rule 60(b) authorizes relief "on motion and upon such terms as are just", *Klapprott* v. *United States*, *supra*. Why the total disregard of Federal Rule 60(b), here employed and having the force and effect of a statute when, in other cases, the Court below *sua sponte* invoked its principles even when unclaimed? *District of Columbia* v. *Stackhouse*, 99 U.S.App. D.C. 242, 239 F 2d 62, 65; *Blunt* v. *United States*, 100 U.S.App. D.C. 266, 272. A federal court has "no dispensing power" over an authorized rule "to suit the circumstances of any particular case", and the Rule must be applied to *all* cases coming within it. *Thompson* v. *Hatch*, 3 Pick. 512; *LaBau* case, *supra*. By its refusal to acknowledge and apply Federal Rule 60(b) the Court below transgressed the fundamental principle that Federal Rules prescribed by this Court are as binding upon the appellate courts as upon the district courts in their rulings. Rule 1; *Societe Internationale*, etc. supra; *United States* v. *Robinson, et al.*, —— U.S. ——, 4 L. ed. 2nd 259; *In Re Giannini*, 90 F 2d 445. It is the duty of courts to ascertain and apply the law to the facts in every proceeding properly brought before it. *Carter* v. *Carter Coal Co.*, *supra*, 296. The Court below refused to do this.

3. *The "Final Order" Ruling Constitutes A Dangerous Precedent.* The Court raised this issue *sua sponte* (R. p. 81) when it ruled on appellees' MOTION TO AFFIRM OR DISMISS. The decision rules that *because* the Appellate Court *construed* the District Court's order "as including a decision" under "inherent power", the order is *therefore* final and appealable. What's the connection? Does the finality of an order *depend* upon a judgment rendered under inherent power? Or upon an

impregnating construction serving only to cloak the proceedings in the District Court?

Where a court's "determination was put on the wrong ground, this Court should so declare that it may not be followed as a precedent", *Hurn* v. *Oursler, et al*, 289 U.S. 238, 240. This holding by the Court below creates a dangerous precedent requiring certiorari, as the *Hurn* case holds. It opens up a floodgate of "final order" uncertainty trenching upon the effectiveness of the Clerk's judgment entry under Rules 58 and 79(a), appeal time under 73(a), and the right to relief under 60(b) from a "final judgment, order or proceeding."

This ruling is again the result of the failure to acknowledge and apply Rule 60(b). The Court below refused in this case to apply the simple, settled law, that an order denying a motion under 60(b) to vacate and reinstate is a "final decision" under 28 U.S.C. 1291. *Klapprott* v. *United States, supra; Ackermann* v. *United States*, 340 U.S. 193; *Bridoux* v. *Eastern Airlines*, 93 U.S.App. D.C. 369, 214 F 2d 207; *Barber* v. *Turberville*, 94 U.S.App. D.C. 335, 218 F 2d 34; *Cromelin* v. *Markwalter*, 5th Cir., 181 F 2d 948, 949; *Greenspahn* v. *Seagram & Sons, Inc.* 2nd Cir., 186 F 2d 616, 618-619; *Marachowsky Stores Co.* v. *O'Connor*, 7th Cir., 188 F 2d 686, 689-690.

The Court's ruling purports to legislate by construction, an unauthorized extension of sec. 1291 contrary to decisions holding that an appeal gives the upper court a power of review of a final order not one of intervention. A court has no power of discretion to treat as final what is not final under sec. 1291; and if the District Court's order denying plaintiff's motion under 60(b) was not final, the appellate court *had no jurisdiction* to review it. *Cohen et al* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546; *Sears Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 437; *United States* v. *Smith*, 331 U.S. 469, 474. Just prior to this decision, the Court below was reversed by

this Court in *United States* v. *Robinson, et al, supra*, on precisely this same issue: of legislating by judicial construction contrary to "the plain words, the judicial interpretations, and the history" of Criminal Rule 45(b).

4. *The Decision Affirms A Void Order And Is Itself Void.* In upholding the District Court in "permitting the [Clerk's] dismissal to stand" (Appendix B, *infra*, p.), the decision below affirms a void order without a remnant of jurisdiction, and is itself void.

> "The affirmance of a void judgment imports no validity to it, especially if such an affirmance is put upon grounds not touching its validity. Thus since an appeal cannot confer upon the reviewing court jurisdiction of the subject matter that the court below did not possess, a judgment of a reviewing court of general jurisdiction affirming a judgment of the court a quo is itself void if the court a quo had no jurisdiction of the subject matter." 3 Am. Jur. sec. 1167, p. 678.

The violation of a constitutional right stands as a jurisdictional bar to a valid judgment, *Johnson* v. *Zerbst*, 304 U.S. 458; and the decision is in conflict with the fundamental law that a void judgment is a nullity even prior to reversal, and an unconstitutional act is as inoperative as if it had never been passed. *Vallely* v. *Northern Fire & Marine Insurance Co.*, 254 U.S. 348, 353-354; *Chic. Ind. & Ry. Co.* v. *Hackett*, 228 U.S. 559, 566.

The Clerk's *nunc pro tunc* dismissal, the applied provisions of Local Rule 13, and alias summons "practice" thereunder, are void for lack of jurisdiction in the District Court and in the Clerk for the judgment rendered and as entered. The decision ignores the Fifth and Seventh Amendments; disregards the injunctions in 28 U.S.C. 2071 and 2072; denies enforcement of Federal Civil Rules 4(a) and (g), 38(a)(b) and (d), 41(b), 58, 77(c), 79(a), 81(c), 82, and 83 with which the order, Rule, and

practice are inconsistent; and conflicts with the following cases applicable herein.

(a) "There are constitutional limitations upon the power of courts, even in the aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause," *Societe Internationale, supra*, 209. There is no power in the District Court to provide by Local Rule for the automatic default dismissal of a cause of action for the failure to comply with even a valid court order *without* prior notice and hearing. A default dismissal or judgment rendered without notice and hearing is without jurisdiction and void for want of due process. *Harvey* v. *Elliott, supra; Windsor* v. *McVeigh*, 93 U.S. 274; *Old Wayne Life Assoc.* v. *McDonough; Scott* v. *McNeal*, 154 U.S. 34, 46. The law authorizing such procedure is unconstitutional for failing therein to *require* notice and hearing prior to the deprivation of property rights. *Lambert* v. *California*, 355 U.S. 225, 228; *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 424-435. Confiscation of a jury trial right by default order without consent, notice and hearing is an "unconstitutional abuse of power", and a substantive wrong. *Bass* v. *Hoagland, supra*, 209; *Sibbach* and *Klapprott* cases *supra; Scott* v. *Neely*, 140 U.S. 106, 109 110. Rule 38.

(b) The failure "from the time action may be taken, to comply with any law, rule or order requisite to the prosecution of his claim . . . if the delinquency continues for six months" provisions are void for being vague and uncertain, and for delegating judicial power to the ministerial office of Clerk. It is fundamental that one may not be penalized for failing to comply with a command that doesn't inform him in definite terms the duties imposed upon him. *Berry* v. *Midtown Service Corporation, et al*, 104 F 2d 107, 111. These provisions compel no definite act, reference no mandate, fix no identifiable time

limits, and contain no ascertainable measure of compliance or default. A statute or rule so vague that men must guess at its meaning and differ as to its application violates the first essential of due process. *Connally, Comm'r* v. *General Construction Co.*, 269 U.S. 385, 391; *Small Co.* v. *Am. Sugar Refining Co.*, 257 U.S. 233, 239-240.

And absent the text of the "previous affirmative command", and absent any standards, guides and direction, the Rule delegates to the Clerk the function of selecting the mandate to be applied, construing the "requisiteness", "action", "compliance" and "delinquency" called for, and then adjudicating that the cause "shall stand dismissed" and make his judgment entry. Such judicial functions cannot be delegated to the ministerial Clerk who has no power of judgment and discretion and may record only a judgment already declared to be such with sufficient precision to warrant its entry. 34 C.J. 59; *Burns* v. *Ohio*, 360 U.S. 252, 257; *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 544; *United States* v. *Schaefer Brewing Co.*, 356 U.S. 227, 228; *Fox* v. *Smith*, 58 U.S. App. D.C. 345, 30 F 2d 869.

(c) The alias summons default practice constitutes an unlawful enlargement of the Court's jurisdiction over a law not in force. Rule 82. *No such federal or local "law, rule or order" exists.* The practice perpetuates a provision in old Local Rule 24, adopted in 1938, and repealed by the District Court in 1941. That Rule had provided for the Clerk's entry of "Dismissed W.P." where a party "took no action since the last not found return" and such failure to act has continued for six months". It was dropped when Local Rule 13 was adopted in 1941. (1 F.R. Serv. p. 917; 4 F.R. Serv. p. 1028)

The practice is contrary to local law. Rule 81(e). The ruling case is *Parsons* v. *Hill*, 15 App. D.C. 532, 548, 551; also *Bliss* v. *Duncan*, 44 App. D.C. 93. The *Parsons*

case is practically on all fours. It holds that when a defendant is outside this jurisdiction and cannot be served, successive alias summons are not required, and lack of diligence is not established by the failure to obtain aliases. The Court holding that the rules "being entirely silent on the matter", the order of the District Court was found "not warranted by what was understood to be the existing practice of the Court as determined by its own rules of procedure."

The practice is inconsistent with Federal Civil Rules 4(a) and (g), 41(b), and 58, and was repealed by para. 4 of 28 U.S.C. 2072 when the Federal Rules became effective in 1938. Under these rules, and Advisory Committee reports, texts, and cases thereunder, an action is commenced by the filing of a complaint and remains alive and pending until dismissed for lack of due diligence by motion under 41(b). There can be no lawful automatic abatement of a cause of action for failure to obtain service or alias summons. The Advisory Committee rejected a similar proposal. Under 4(g), the original summons remains valid until served, and successive alias summons cannot be lawfully required, although the Clerk must issue same upon request under 4(a). *Hackner* v. *Guaranty Trust Co. of N. Y.*, 117 F 2d 95, 99, c.d. 313 U.S. 559, and Supreme Court cases cited; *Messenger* v. *United States*, 231 F 2d 328; *Barron & Holtzoff*, Federal Practice and Procedure, Vol. 1, Rule 3, p. 379; Rule 4, p. 288, and *Clark*, Proceedings, Cleveland Institute, 1938, p. 208, Appendix A, *infra*, pp. 35-36.

Plaintiff's cause of action still pending and no default having occurred, the Clerk's dismissal upon the alias summons default ground is void for want of jurisdiction. A dismissal entry for the claimed default of a Rule that does not exist is without jurisdiction, and void. *Fox* v. *Smith*, *supra*, 870; *Parsons* v. *Hill*, *supra*; *Rehfeld* v. *Baltimore & O. R. Co.*, 187 Fed. Rep. 810, 811. In *Bass* v.

Hoagland, supra, the Court said, p. 209: "Strong ground has been taken by the Supreme Court, and in strong language, against treating cases in default which were not so." And the perpetuation of an unlawful doctrine or practice is an "unconstitutional assumption of powers by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 79.

(d) The "shall stand dismissed" operation of Local Rule 13 is void. There is no authority in the Federal Rules for the self-executing operation of a judgment. The "shall stand dismissed" clause is inconsistent with Federal Rule 58 under which an action is not terminated until the Clerk's docket entry of the judgment as provided by Rule 79(a). There is no effective judgment until such entry, and any local practice inconsistent therewith is invalid. *United States* v. *Schaefer Brewing Co.*, 356 U.S. 227.

(e) No dismissal entry having been made prior to plaintiff's alias summons request on March 10, 1959, plaintiff's cause of action was still pending and the Clerk's denial of such request was contrary to Rules 4(a), 41(b), 58 and 79(a), as shown above. Plaintiff was entitled to her aliases; there was no prior default, no delinquency, no valid judgment, no dismissal entry. *Hackner and Messenger cases supra; In re D'Arcy*, 142 F 2d 313; *Thompson* v. *Trent Maritime Co. Ltd., et al*, 149 F. Supp. 478. The Clerk's refusal was a denial of plaintiff's legal rights and resulted in depriving her of her lawsuit without due process of law. *Buck* v. *Felder, et al.*, 208 Fed. Rep. 474, 478-479.

(f) The Clerk's *nunc pro tunc* dismissal order is void for lack of jurisdiction in the Clerk to enter it. No statute, federal or local "law, rule or order" authorizes a *nunc pro tunc* default dismissal entry by the Clerk, on his own motion, without prior notice, hearing, and court

order. A "judgment entered by a clerk who had no authority to enter it in the form in which it was entered is void." 34 C.J. 59; *Pressed Steel Car Co.* v. *Steel Car Forge Co.*, 149 Fed. Rep. 182; *In re Rogers-Pyatt Shellac Co.*, 51 F 2d 988. Federal Rules 58; 79(a).

(g) The authority to the Clerk in Local Rule 13 for unilateral entry of even a timely default dismissal order without specific default charge named and without notice, is further inconsistent with Federal Rule 77(c). That authorizes the Clerk's *granting* of "all motions and applications" for default entry not requiring court order. This pre-conditions initiating action from an agency outside the Clerk's office. Rule 7(b)(1) defines "application" as "motion" which "shall state with particularity the grounds therefor", and requires notice to the "parties affected" under Rule 5(a).

(h) Furthermore, the Clerk's dismissal order is invalid for failing to show the substance of such order as required by 79(a), *United States* v. *Schaefer Brewing Co.*, *supra*. (R. & JA 52. [This point was not raised below. It is an error patent on the record. *Sibbach*, *supra*]

(i) Local Rule 13 is inconsistent with Federal Rule 41(b) which prescribes the exclusive procedure for involuntary dismissal of a cause of action for failure to prosecute, and is therefore invalid. Rule 83. Plaintiff was deprived of these due process protections embraced by the Federal Rule: defendant's motion with notice, specific default named, hearing, proof of lack of due diligence lawfully required, and competent jurisdiction for the judgment rendered and as entered. Under rule 13, there is no notice, hearing, identifiable duty or default, or proof of lack of diligence. There is no valid judgment in the "shall stand dismissed" clause and no jurisdiction in Court or Clerk to render or enter a default dismissal under all these judicial deficiencies. This is not a situa-

tion "not provided for by rule". The procedure is prescribed in 41(b) "for failure of the plaintiff to prosecute or to comply with these rules or any order of court." (App. A, infra, p. 33)

When a procedure has been prescribed by the Supreme Court in a federal rule for uniform application after consideration and rejection of other proposals, the Rule prescribed is exclusive. The Supreme Court having proceeded to regulate the matter, their regulation is complete, inhibiting what it does not allow, as well as governing what is fixed by positive appointment. *Gibbons* v. *Ogden*, 9 Wheat. 1. There is no "inherent power" in a district court to "legislate" by rule-making practices unauthorized by the Federal Rule. There is no "inherent power" in any federal court by judicial decision or "construction" to ignore, authorize, or sanction any procedure contrary to or inconsistent with any right, remedy or measure prescribed by the Supreme Court in the applicable Rule.

In upholding the Clerk's *nunc pro tunc* dismissal "pursuant to Local Rule 13" the decision is in conflict with these cases on the above principles: *Los Angeles Brush Mfg. Co.* v. *James*, 272 U.S. 693, 706, mandamus will lie for district court practices inconsistent with the prescribed Supreme Court Rules. In *Miner* v. *Atlass*, *supra*, June 20, 1960, mandamus affirmed: no inherent power in the District Court to adopt a Local Rule providing for oral depositions for discovery only when such procedure was not specifically authorized by General Admiralty Rule 32C. In *U.S.* v. *Robinson*, *supra*, no power in the appellate court by judicial "construction" to "legislate" an amendment to Criminal Rule 45(b). In *LaBay* v. *Hoover Leather Co., et al*, mandamus: no discretionary power in the District Court to order a reference to a Master beyond the authorized scope of Federal civil Rule 53(b). In *United States* v. *Smith*, *supra*, no inherent power in the District Court to order a new trial beyond the time

prescribed by Criminal Rule 33. In *U.S.* v. *Schaefer*, *supra*, no inherent power in the District Court to perpetuate, or in the appellate court to sanction, a local "practice" on judgments contrary to Federal Rule 58. In *Sibbach* v. *Wilson*, *supra*, no inherent power in the District Court to commit for contempt for failure to comply with a physical examination order when Federal Rule 37(b) forbade such sanction; and no power in the Court of Appeals to uphold such violation of the Federal Rule, although unpleaded.

5. *The Construction On "Inherent Power" Is Invalid.* By a legerdemain "construction" on inherent power, the decision below purports to thwart review of the due process questions raised. *Cf. Lockerty* v. *Phillips*, 319 U.S. 182, 188. The appealed order was made "upon consideration" of *plaintiff's motion* under 60(b) to vacate the "dismissal entered pursuant to Rule 13", and the "hearing held thereon". (R. & JA 64) That order is *construed* "as including a decision made in the exercise of the court's inherent power to dismiss the action for lack of prosecution" (App. B, infra, p. 38) Why? Under such powers of creative construction, every process, order, judgment and conviction could be rescued from invalidity by a convenient additive "to suit the circumstances of any particular case", and due process rendered nugatory by judicial fiat. *Thompson* v. *Hatch*, *supra*. Such a ruling is contrary to this Court's decisions holding that the power of construction does not extend to the power of amendment, whether of statute, rule, or court order. *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 518; *U.S.* v. *Robinson*, and *Cohen* v. *Beneficial Industrial Loan Corp. Inc.*, *supra*.

The Court's construction is directly contrary to the *Societe* case, *supra*, which reversed this Circuit Court below in similar circumstances. Defendant moved under Federal Rule 37 for a dismissal for failure to comply with a production order. This Court stated, p. 206:

> "The District Court found power to dismiss under 37(b)(2)(iii) of the Federal Rules . . . as well as in the general equity power of a federal court. The Court of Appeals chose not to rely upon Rule 37 but rested power on 41(b) and on the District Court's inherent power." At p. 207: "Reliance upon Rule 41, which cannot easily be interpreted to afford a court more expansive powers than does Rule 37, or upon 'inherent power' can only obscure analysis of the problem before us."

Thus, this Court ruled out "inherent power" where none was authorized or exercised. As in the cases cited previously, the case holds that the power to act rested exclusively upon the employed Federal Rule 37(b) which provided for the procedure and under which the dismissal was effected. Why, then, the construction on "inherent power" here, except to "obscure" the "issues" below? This construction seeks to evade both the due process *failures* in the Clerk's order and Local Rule 13, and the due process *requirements* in Federal Rule 41(b). The Court cites no authority for this, the general statement following being merely the generic principle on inherent power. The cases cited are not in point. None was an appeal from the denial of a motion under 60(b). In none were constitutional or Federal Rule inconsistency questions raised. (See Petition For Rehearing, analysis, R. pp. 99-100).

No inherent power was here exercised. To deny a motion to vacate an order that is void does not cure the voidness of that order. And inherent power to adopt rules is circumscribed in the District Courts by the required adherence to constitutional guarantees and to procedures consistent with those prescribed by this Court.

In the *Societe* case, this Court held further that 37(b) must be read in the light of the Fifth Amendment guarantees and the right to a trial upon the merits; and such rights are denied in the dismissal of an action for failure to comply with even a valid order when the failure is not

wilful. And there was no power in the District Court to strike plaintiff's cause of action for the failure to comply with an invalid order for a non-existent delinquency and enter a default dismissal without notice and hearing. *Hovey* v. *Elliott*, *supra*; *Windsor* v. *McVeigh*, 93 U.S. 274.

6. *Federal Rule 60(b) Must Be Liberally Construed To Afford A Trial Upon The Merits.* In ruling there was no abuse of discretion in permitting the dismissal to stand, the decision ignores the basic law that diligence and discretion are not in issue in the matter of a void judgment. What is in issue is "the constitutional validity of this judgment under the admitted facts", not diligence. *Bass* v. *Hoagland*, *supra*, 206, 209. No amount of judicial discretion can supply failures of jurisdiction; the proceeding is *coram non judice* and void. *Ex Parte Bradley*, 7 Wall. (U.S.) 364, 377, 379. The refusal to consider the issue of a void judgment on a motion under Federal Rule 60(b) is itself an abuse of discretion, *Winhoven* v. *United States*, 201 F 2d 174. From *Barron & Holtzoff*, *supra*, Vol. 3, sec. 1327:

> "Rule 60(b) (4) authorizes relief from void judgment . . . there is here no question of discretion on the part of the court."

And if diligence and discretion be in issue here, the decision is in conflict with cases holding that 60(b) must be liberally construed and all facts and circumstances of the particular case must be considered. Judicial discretion is "conscientious judgment, not arbitrary action" and "is directed by the reason and conscience of the judge to a just result". *Klapprott* v. *U. S.*, *supra*; *Burns* v. *United States*, 287 U.S. 216, 222-223. Even the slightest abuse of discretion *requires* reversal, *Bridoux* v. *Eastern Airlines*, this Circuit, *supra*.

In upholding the finding of lack of diligence, the decision ignores the finding of failure to make a showing of

excusable neglect and is in conflict with the cases holding that the District Court's order must be reversed for the findings being insufficient in law. They are "useless for appellate purposes" in failing to state the factual basis for the Court's ultimate conclusions in the order. *Kelley* v. *Everglades Drainage District*, 319 U.S. 415, 421-422; *Baumgartner* v. *United States*, 322 U.S. 665, 671; *Von Der Heydt* v. *Rogers*, 102 U.S.App. D.C. 115, 251 F.2d 17; *Tozer* v. *Charles A. Krause Milling Co.*, 189 F.2d 242, 245.

What standard of diligence was applied? Upon what facts and what law? And what standard of judicial discretion? If plaintiff was not required by law to obtain the aliases, she was not in default. If she was so required, under what law and what language? Old Rule 24? And if under Local Rule 13, "action" *may* have been taken as late as Sept. 30, 1958. Her *delinquency* couldn't begin until Oct. 1, 1958 and must "continue six months". Local Rule 13 could not have "operated" until April 1, 1959—weeks after her alias request. At the time of her motion hearing, plaintiff did not know the alias requirement to be contrary to the Federal Rules. The District Court did know that. (R. & JA 62), *Barron & Holtzoff*; App. A, *infra*, pp. 35. As the Court was aware of the *nunc pro tunc* dismissal (R. & JA 59) but stopped plaintiff from discussing it each time she attempted to do so. (R. & JA 59; 62).

Were the findings made upon the basis of the prior dismissal? When it occurred completely without fault or knowledge of plaintiff when prior co-counsel was on record? (R. & JA 41), *supra* p. 8. When the dismissal was entered upon the same alias summons ground, and it's clear from co-counsel's petition that a lack of knowledge of local practice existed? (R. & JA 37)

Were the findings made and upheld upon the basis that plaintiff's failure to serve Meader was wilful? When

he was continuously outside the jurisdiction, when she had diligently adhered to the practice of procuring the aliases to protect her case, when, under the cases in this jurisdiction, the failure to obtain service upon someone who cannot be served for absence from the jurisdiction cannot be held to be lack of diligence? *Parsons* and *Bliss* cases, supra; *Tyler* v. *Mutual Dist. Messenger Co.*, 17 U.S.App.D.C. 85.

Can she be guilty of failing to make a showing of excusable neglect when under the law there is no neglect to excuse? And no notice had been sent her, no dismissal entered, and she had moved for the aliases to supply the omission, if omission it was, prior to any action taken? When, under the law, it was an *abuse* of discretion by the Court to deny her motion when she had moved to supply the defect complained of? *Buck* v. *Felder*, *supra*, 478-479.

Were the findings made and upheld upon the basis plaintiff should have severed (R. & J.A 62)? When the Clerk's dismissal as to the two served defendants was unlawful, no claimed default existing as to them? And when such voluntary action by plaintiff would have afforded advantage to the defendants, Meader being potentially released from liability, and incompetent to testify to actions involving them because of his insanity? And when it appears to be the law that neither plaintiff nor defendants had a *right* to severance under these circumstances? *Klugman's Sons, Inc.* v. *Oceanic Steamship & Nav. Co. Ltd. et al*, 42 F 2d 461; *Dunn* v. *Parker*, 8 F.R.D. 373; *Cf Field* v. *American-West African Line, Inc.* 154 F 2d 652.

Were the findings made upon the basis that the alleged libels were committed "in due course of business" (R. & J.A 60)—a legal conclusion the District Court presumed without proof, briefs or arguments, without knowledge of 5 U.S.C. 637 (App. A *infra*, p. 32), without the defend-

ants at any time having sought to test such theory in this case, and without heed that congressional prohibitions cannot be overridden and judicial protection of rights conferred by statute is intended to be enforced? *Leedom v. Kyne*, 358 U.S. 184, 189-190.

The decision is in conflict with rulings that the life and purpose of court rules is to achieve justice. *United States v. Ohio Power Co.* 353 U.S. 98. Particularly in this case of libel, where professional reputation and employment is involved, was plaintiff's case caught in the chain of Meader's insanity. The meager facts in the Opinion are not a fair representation of the record in this case. And if discretion and diligence be here in issue, the decision is patently a departure from the cases holding to these fundamental principles applicable here: Federal Rule 60(b) must be liberally construed; the Court must consider all facts relevant to the issue of "diligence" to properly exercise discretion; the test is reasonable diligence under all the facts; and where there is good faith, no intervening equities, no intentional discontinuance by plaintiff, no wilful neglect, no wilful failure to comply with a court order, valid or invalid, the striking of a cause of action, without notice and hearing, is a denial of due process and the denial of a motion under 60(b) to vacate and reinstate is an abuse of discretion. *Klapprott v. United States*, *supra*; *Societe*, *supra*; *Barber v. Tarberville* and *Bridoux v. Eastern Airlines*, this Circuit, *supra*; *Parsons v. Hill*, this Circuit, *supra*; *Seymour v. Hawkins*, 76 U.S. App. D.C. 376, 133 F 2d 15; *Maier v. Independent Taxi Owners Ass'n*, 68 U.S.App.D.C. 307, 96 F 2d 579.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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August 1960

APPENDIX A

Statutes, Rules, and Texts

1. *Title* 28, U.S.C. *Section* 1291 provides:

"Final decisions of district courts.—the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

2. *Title* 28 U.S.C. *Section* 2071 provides:

"The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

3. *Title* 28 U.S.C. *Section* 2072 provides:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

* * * * *

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede or repeal any such rules heretofore prescribed by the Supreme Court."

4. *Title* 5 U.S.C. *Section* 637 provides in pertinent part:

"That . . . any person in the public service who shall willfully and corruptly, by himself, or in cooperation with one or more persons . . . make any false representations . . . concerning the person examined, or who shall willfully and corruptly furnish to any person any special or secret information for the purpose of . . . injuring the prospects or chances of any person so examined . . . being employed, or promoted, shall for each such offense be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars, nor more than one thousand dollars, or by imprisonment not less than ten days, nor more than one year, or by both such fine and imprisonment."

FEDERAL RULES OF CIVIL PROCEDURE
(In pertinent part)

Rule 4—Process—provides:

"(a) . . . Upon request of the plaintiff separate or additional summons shall issue against any defendants."

"(g) . . . Failure to make proof of service does not affect the validity of the service."

Rule 38—Jury Trial Of Right—provides:

"(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." . .

"(b) Demand. Any party may demand a trial by jury. . . . Such demand may be indorsed upon a pleading of the party."

"(d) Waiver. . . . A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

Rule 41(b) Involuntary Dismissal: Effect Thereof—provides:

"For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

Rule 58. Entry of Judgment—provides:

". . . The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes entry of the judgment; and the judgment is not effective before such entry . . ."

Rule 60(b). Mistakes; Inadvertence; Excusable Neglect . . . provides:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect: . . . (4) the judgment is void; . . . (6) any other reason justifying relief from the operation of the judgment."

Rule 77(c) Clerk's Office and Orders by Clerk—provides:

"All motions and applications in the clerk's office . . . for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk: . . ."

Rule 81(e) Law Applicable—provides:

"Whenever in these rules the law of the state in which the district court is held is made applicable, the law applied in the District of Columbia governs proceedings in

the United States District Court for the District of Columbia . . ."

Rule 82. Jurisdiction and Venue Unaffected—provides:

"These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

Rule 83. Rules by District Courts—provides:

"Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

Local Rule 13—Dismissal For Failure to Prosecute

"(a) Clerk to Warn Dilatory Party; Dismissal Without Prejudice; Notice of. "If a party seeking affirmative relief fails for five months, from the time action may be taken, to comply with any law, rule or order requisite to the prosecution of his claim . . . the clerk shall warn the dilatory party by mail that his claim will stand dismissed if he fails to comply with this rule, making a note in the docket of the mailing; and if the delinquency continues for six months the complaint, . . . shall stand dismissed without prejudice, whereupon the clerk shall make entry of that fact and serve notice thereof by mail upon every party not in default for failure to appear, of which mailing he shall make an entry.

"(b) Failure to Warn: Effect. A failure of the clerk to give the warning as above provided will not affect the running of the six months' period or otherwise relieve a party from operation of this rule."

TEXTS

1. *Barron & Holtzoff, Federal Practice and Procedure, Rules Edition:*

(a) *Vol. 1, Rule 3, Sec. 167, p. 279:* "The rules contain no provision limiting the time for service of the summons and complaint. The advisory committee stated that other rules providing for dismissal for failure to prosecute suggest a method available to attack unreasonable delay in prosecuting an action after it has commenced."

(b) *Vol. 1, Rule 4, Sec. 173, p. 288:* ". . . Separate or additional summons are issued against any defendants upon request of the plaintiff. Provisions for additional subpoenas were contained in the former equity practice. (18) It should be noted that there is no time limit to the validity of the summons and the summons remains valid until served, subject to the power of the court to dismiss the case for failure of the plaintiff to use due diligence to procure service as pointed out in section 163. (19) For this reason, an additional summons would not be needed merely because of delay in service. If the summons is against several defendants and part of them only are served, it may be returned within the time required by Rule 4(g) and additional or separate summons procured for those not served. It has been pointed out, however, that even this is not absolutely necessary, since Rule 4(g) provides that failure to make proof of service does not affect the validity of the service. (20)"

And at Footnote (20): "'Back in Rule 4(a) it is provided that upon request of the plaintiff separate or additional summons shall issue against any defendants, but I think you will notice that in the summons itself there is a direction that the defendant must answer within the term required, which is twenty days. I take it that the summons itself would be good if it has not been served at all and the case is still alive.

"'We have made the suggestion in the notes that later rules which provide for the dismissal of a case which is not promptly pressed may be resorted to. Suppose, however, no action has been taken looking to the dismissal of the case, and suppose the summons has not been served on any one. I think then that the summons would remain alive, as you say, and could be served. Why shouldn't it be, because the only other alternative is to go to the clerk and get another summons of the same kind?

"'Return of service is not a jurisdictional fact, so even if that were omitted it would only be ground for appeal to the court to have the return ordered filed and to have the case dismissed for failure to prosecute it promptly. But again the system is rather simple that way, and the case does remain alive, without reference to these matters of whether the summons is used or not, until it is definitely dismissed by the court on some proceedings for failure to have it prosecuted promptly.' Clark, Proceedings Cleveland Institute, 1938, p. 208."

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15231

CHARLOTTE SLAVITT, APPELLANT

v.

GLENN F. MEADER, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided April 14, 1960

Miss Charlotte Slavitt, appellant *pro se*.

Mr. William W. Greenhalgh, Assistant United States Attorney, with whom *Messrs. Oliver Gasch* and *Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellees.

Messrs. Robert M. Beckman, Francis L. Young, Jr., and *John P. Burke* filed a brief on behalf of the Bar Association of the District of Columbia, as *amicus curiae*, urging the court to sustain the validity of Rule 13 of the Local Civil Rules of the United States District Court for the District of Columbia. Mr. *Sheldon E. Bernstein* also entered an appearance for The Bar Association of the District of Columbia.

Before EDGERTON, FAHY and BASTIAN, *Circuit Judges*.

PER CURIAM: On August 13, 1953, appellant filed in the District Court a complaint to recover damages for alleged libel and conspiracy, related to her occupational qualifications as a civilian employee of the Navy Department. Two of the three defendants were served with process and answered. One has never been served. In

the intervening years the complaint was dismissed twice under Rule 13 of the United States District Court for the District of Columbia.[1] This occurred first on March 3, 1954, followed by reinstatement of the case April 27, 1954. The second dismissal was March 10, 1959, followed on March 31, 1959, by appellant's motion to vacate the dismissal and to reinstate the action. After a hearing the court denied the motion by an order containing a finding *inter alia* that "plaintiff has failed to prosecute this matter with due diligence." It is from this order that the present appeal was taken. We construe the appealed action of the court as including a decision made in the exercise of the court's inherent power to dismiss the action for lack of prosecution.[2] That the court has this inherent power, within the bounds of a sound discretion, aside from the authority to dismiss granted by Rule 41,

---

[1] Rule 13 of the United States District Court, Rules for the District of Columbia provides in pertinent part:

> (a) *Clerk to Warn Dilatory Party; Dismissal without Prejudice; Notice of.*—If a party seeking affirmative relief fails for five months, from the time action may be taken to comply with any law, rule or order requisite to the prosecution of his claim, or to avail of any right arising through the default or failure of an adverse party, or to file a Certificate of Readiness under Rule 11(d), within six months from the date the action is called on the call of the civil calendar, the clerk shall warn the dilatory party by mail that his claim will stand dismissed if he fails to comply with this rule, making a note in the docket of the mailing; and if the delinquency continues for six months the complaint, counterclaim, cross-claim or third party complaint of said party, as the case may be, shall stand dismissed without prejudice, whereupon the clerk shall make entry of that fact and serve notice thereof by mail upon every party not in default for failure to appear, of which mailing he shall make an entry.
>
> (b) *Failure to Warn; Effect.*—A failure of the clerk to give the warning as above provided will not affect the running of the six months' period or otherwise relieve a party from operation of this rule.

[2] So construed the order is clearly a final and appealable decision within the meaning of 28 U.S.C. § 1291 (1958).

Fed. R. Civ. P., or by any local rule or practice, is clear. *American Nat'l Bank & Trust Co. v. United States*, 79 U.S. App. D.C. 62, 142 F.2d 571; *Barger v. Baltimore & O.R.R.*, 75 U.S. App. D.C. 367, 130 F.2d 401. See also *Shotkin v. Westinghouse Electric & Mfg. Co.*, 169 F.2d 825 (10th Cir. 1948); *Sweeney v. Anderson*, 129 F.2d 756 (10th Cir. 1942); *Hicks v. Bekins Moving & Storage Co.*, 115 F.2d 406 (9th Cir. 1940).

The history of this litigation, as shown by the record and as developed in the hearing on the motion, amply justified the court in finding that appellant had failed to prosecute her action with due diligence. For this reason it cannot successfully be contended that the District Court abused its discretion in permitting the dismissal to stand by reason of such failure.

This disposition of the appeal renders it unnecessary to consider the question raised by appellant as to whether the dismissal was properly made under local Rule 13, or to reach the question of the validity of that Rule.

Affirmed.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1959

No. 15,231

Civil 3752-53

CHARLOTTE SLAVITT, APPELLANT

v.

GLENN F. MEADER, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

Before EDGERTON, FAHY and BASTIAN, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam

Dated: April 14, 1960

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1959

No. 15,231

CHARLOTTE SLAVITT, APPELLANT

v.

GLENN F. MEADER, ET AL., APPELLEES

Before PRETTYMAN, *Chief Judge*; EDGERTON, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges*, in Chambers.

ORDER

Upon consideration of Appellant's petition for a rehearing en banc, it is

ORDERED by the court that the petition for rehearing en banc is denied.

Per Curiam

Dated: May 9, 1960

APPENDIX C

EXCERPT from BRIEF FOR THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, AMICUS CURIAE. Filed Feb. 8, 1960

"THE RULE DOES NOT DELEGATE JUDICIAL FUNCTIONS TO THE CLERK" (p. 9)

"Local Rule 13 is a judicial order. It is a general order which applies to every case docketed in the District Court. It is judge made and judge executed. The clerk exercises no function requisite to the dismissal of a case. A case is dismissed by operation of the Rule. The clerk's participation is entirely ministerial. He performs his function after the cause has been dismissed by operation of the Rule. His duty is to enter the fact of dismissal in the docket and to send notice to the parties who have appeared.

"Local Rule 13 provides that a case which has not been prosecuted for six months 'shall stand dismissed'. The dismissal occurs automatically when the conditions set forth in the Rule are met. No action of the clerk precedent to dismissal is required or provided for. The dismissal is entirely judicial, by force of the judicial rule.

"*After* the action is dismissed by operation of the Rule, the clerk records the fact by making an appropriate entry on the docket. The clerk's entry is not essential to the validity of judgment. The case would stand dismissed whether or not the clerk made the entry.

> "'Entry is merely a ministerial duty of the clerk to perpetuate that act, though in most jurisdictions necessary to create a lien or start running the time to appeal.' *Zadig* v. *Aetna Ins. Co.*, 42 F 2d 142, 143 (2d Cir. 1930)

"The clerk's erroneous entry of dismissal does not affect a case which has not in fact been dismissed by operation

of the Rule. Such a case is still pending notwithstanding the clerk's entry.

"This point was explicitly decided by this Court in *Fox* v. *Smith*, 58 App. D.C. 345, 30 F.2d 869 (1929). [follows discussion of case] [p. 11] "Thus, it is clear that the clerk's entry in the docket is irrelevant to the status of the case. If the case is actually in default as defined by Local Rule 13, the case stands dismissed whether the clerk makes the entry or not . . . ."

The Appendix in the Bar Association's Brief, *amicus* contains a useful compilation of "comparable" local rules on "failure to prosecute." From the variety of procedures reflected therein, clarification by this Court for uniform procedures under Federal Rule 41(b) for dismissals appears compelling.